No. 1372

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

*RICKEY LAND AND CATTLE COMPANY (a Corporation),*

*Appellant,*

*vs.*

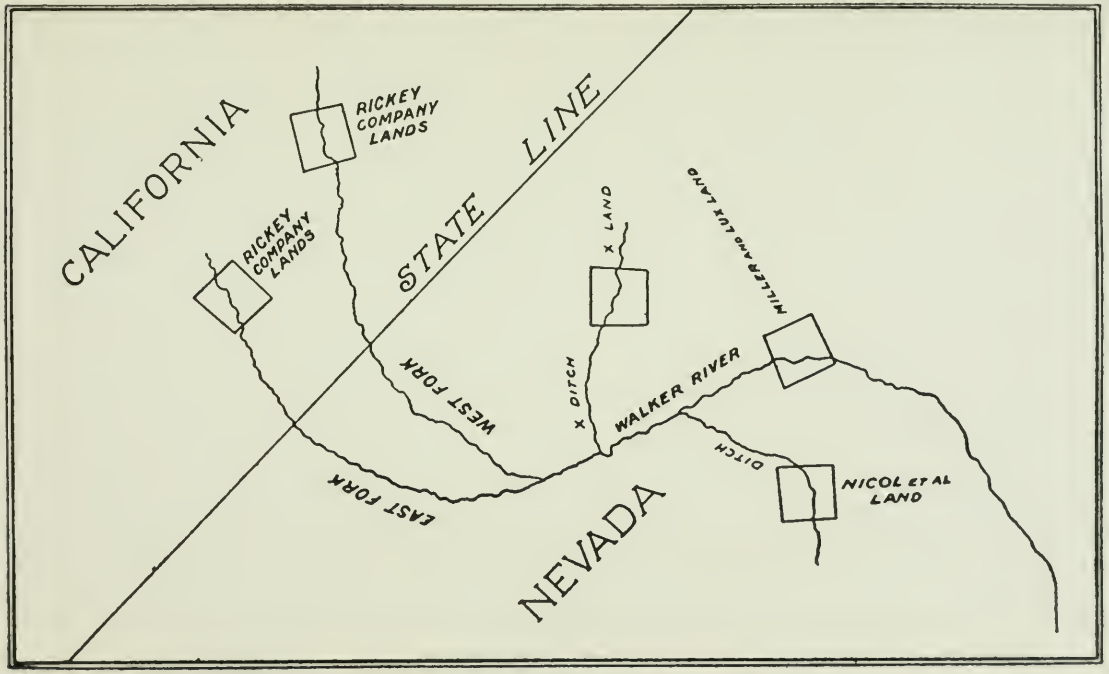
*JAMES NICHOL, F. FEIGENSPAN, ANGUS McLEOD, MARY T. SHAW, DeWITT CROWNINSHIELD, M. J. GREEN, C. F. MEISSNER, HAMILTON WISE, J. F. HOLLAND, C. F. HOLLAND, THOS. HALL, E. S. CROSS, D. J. BUTLER, J. S. SWEETMAN, JOHN COMPSTON, J. C. MILLS, A. W. GREEN, and SPRAGG-WOODCOCK DITCH COMPANY (a Corporation),*

*Appellees.*

## Argument of Chas. C. Boynton for Appellant.

JAS. F. PECK,
CHAS. C. BOYNTON,
Solicitors for Appellant.

PRESS OF THE JAMES H. BARRY CO.
212-214 LEAVENWORTH ST.


CALIFORNIA
STATE LINE
NEVADA
RICKEY COMPANY LANDS
RICKEY COMPANY LANDS
X LAND
MILLER AND LUX LAND
WEST FORK
EAST FORK
X DITCH
WALKER RIVER
DITCH
NICOL ET AL LAND

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*Appellant,*

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## ARGUMENT OF CHAS. C. BOYNTON FOR APPELLANT.

This is an appeal from an interlocutory decree made by the United States Circuit Court for the District of

Nevada, enjoining appellants from prosecuting two certain suits in Mono County, California, on the ground that the necessary effect of the prosecution of said suits would be to bring on for trial and determination the same issues as subsequently were presented by certain cross-bills filed by appellees in a suit theretofore pending in the United States Circuit Court for the District of Nevada, and thereby interfere with and defeat the jurisdiction of the said United States Court.

For the purpose of simplifying the statement of the facts herein, we have prepared the accompanying plat of the properties involved in this litigation. The Walker River, it will be observed, rises in two branches, known as the East Fork and the West Fork, in the State of California, and flows through the eastern part of that State into and through the western part of the State of Nevada, to a point where the two branches join to form the main river, which flows on through the State of Nevada. Appellant owns two tracts of land in the State of California, marked on the plat, Rickey Company lands, which said tracts of land are each riparian to a branch of the Walker River in that State. Appellant claims a right to certain definite quantities of the waters of each branch of said river within the State of California to irrigate its lands in the State of California (Trans., p. 8 to 14).

Miller & Lux, a corporation of California, owns certain lands on the main Walker River in the State of Nevada, noted in plat as Miller & Lux land, and claims

a right to a certain definite quantity of the waters of the said river in the State of Nevada to irrigate the said lands (Trans., p. 5). Appellees own certain lands, in the State of Nevada, marked on the plat Nichol, et al., land, lying somewhat higher up on the stream than the lands of Miller & Lux, and claim a right to divert waters from the said Walker River in the State of Nevada for the purpose of irrigating these lands (Trans., p. 14-15). Both appellees and appellant herein are citizens of the State of Nevada.

On July 10, 1902, Miller & Lux, a citizen of California, commenced an action in the United States Circuit Court for the District of Nevada against one hundred and thirty-seven citizens of Nevada, including appellees and one T. B. Rickey, who was the predecessor in interest of the Rickey Land and Cattle Company, and alleged that it was the owner, by appropriation, of certain interests in the waters of the Walker River in the State of Nevada (Trans., p. 5), and sought to enjoin the defendants in that action from diverting the water from the Walker River and depriving it of water to which it was entitled.

On October 15, 1904, the Rickey Land and Cattle Company, which, theretofore, on August 6, 1902, had purchased from Mr. Rickey his lands and water rights in the State of California, commenced two ~~certain~~ actions in the Superior Court of Mono County, California, against Miller and Lux and appellees, wherein it alleged that it was the owner of the

right to divert and appropriate certain waters of the Walker River in the State of California (Trans., p. 9), and sought to quiet its titles to its water rights in the Walker River in the State of California. It is to be observed that the issues presented by these actions commenced in the State of California were as to the ownership and title of appellant to the right to divert water from the Walker River in California. Summons was served on the appellees herein and the appellees herein appeared in said actions in said Superior Court of California and filed general demurrers in said last mentioned actions on or before December 28, 1904 (Trans., p. 29).

Subsequent thereto, and on the 5th day of January, 1905, appellees herein filed cross-bills against T. B. Rickey in the original action commenced by Miller & Lux in the United States Circuit Court for the District of Nevada (Trans., p. 14). Appellees alleged in said cross-bills that they owned certain rights and appropriations in the waters of the Walker River, on which rights their co-defendant, T. B. Rickey, was trespassing. Wherefore, an injunction was prayed. It is to be observed that the issues presented by these cross-bills were as to the ownership and title of appellees to the right to divert water from the Walker River in Nevada.

At this point we feel bound to call this Court's attention to the fact that the complaint filed herein fails to state that the rights and appropriations of the waters of the Walker River claimed to be owned by appellees

are alleged by the cross-bills to exist in the State and district of Nevada. As it appears from the complaint herein that the Walker River flows partly in the State of California, and partly in the State of Nevada (Trans., p. 10), the complaint, in failing to allege that the rights claimed by appellees were alleged in said cross-bills to exist in the State of Nevada, failed to affirmatively show that the Circuit Court of the District of Nevada had any jurisdiction over the subject matter of said cross-bills and of the issues presented thereby, as, obviously, the Nevada Court has no jurisdiction over a controversy between rival claimants of rights to that portion of the stream that flows entirely in California. *Conant* vs. *Deep Creek Irr. co.,* 23 Utah, 627; 66 Pac., 188. This insufficiency in the bill herein warrants a reversal of the decree, but we do not desire to insist on this point, as the cross-bills did in fact allege that these rights and appropriations existed in the Walker River in the State of Nevada, and if the case went back on this point, appellees would simply amend and bring the case up again, wherefore, we prefer to treat the allegation of the bill herein as showing what the cross-bills really did allege.

The subpoenas issued on said cross-bills were served on said Rickey on or about the 5th day of January, 1905 (Trans., p. 16), and immediately thereafter this action was begun to enjoin appellant herein from further prosecuting said actions in the Superior Court of Mono County, State of California, on the ground that the nec-

essary effect of said last mentioned actions was to bring on for trial and determination in said Superior Court the same issues as presented by said cross-bills filed in said original action of Miller & Lux vs. T. B. Rickey, and obtain from said Superior Court a judgment determining said issues in advance of any determination thereof by the Court under the cross-bills in the original action, and thereby defeat the jurisdiction of the said United States Court (Trans., p. 16). An interlocutory order and decree, restraining appellants herein from prosecuting said actions in the California Court was thereafter entered (Trans., p. 57), and from such order and decree this appeal is taken.

Appellant desires to present two grounds wherefor said interlocutory order and decree should be reversed.

*First*: *The issues presented by the cases brought in the Superior Court of California are not the same issues as those presented by the cross-bills filed in the United States Circuit Court for the District of Nevada.*

*Second*: *Assuming that the issues presented by the actions commenced by appellant in the Superior Court of California are the same issues as presented by the cross-bills filed in the United States Circuit Court for the District of Nevada, yet as appellees herein were served with summons and made a general appearance in said actions in California by filing demurrers therein before they filed said cross-bills, or commenced this ac-*

*tion, they thereby waived any right to object to the prosecution of the said actions in California.*

These two points will be considered in their order.

## I.

It is observed that the questions involved in point one were decided adversely to appellant's contention in the case of the *Rickey Land and Cattle Company* vs. *Miller & Lux,* 152 Fed., 11, recently decided by this Court. In arguing this point, we shall take the liberty to briefly comment on that decision and its application to this case.

The ground on which the injunction was granted in the Court below was, that the issues tendered by the actions commenced in the Superior Court of California were the same issues as were presented by the cross-bills of appellees in the action of *Miller & Lux* vs. *Rickey et al.* This, we contend, was error. Both the action commenced by Miller & Lux in the State of Nevada, and the action commenced by the Rickey Land and Cattle Company in the State of California, were actions to quiet title to certain specific property in the complaints described. The issues, therefore, in each of the said actions were as to the title to the specific property in the complaints described, which property constituted the subject matter of the respective actions. It is clear, therefore, that if all the property constituting the subject matter of the actions commenced in

Mono County, California, was different and distinct property from that which constituted the subject matter of the action in Nevada, then the issues made, as to the title to the property that constituted the subject matter of the actions in California were necessarily not the same issues that were made as to the title to property which constituted the subject matter of the cross-bills in the action in Nevada. In other words, the decree herein is sustainable only on the ground that the subject matter, or some portion of the subject matter, of the actions commenced in California is likewise a subject matter of the cross-bills filed in the State of Nevada. Thus, as the actions are local actions, there must exist in all these actions a common subject matter over which the Court in Nevada and the Court in California have concurrent jurisdiction; for if either Court lacks jurisdiction over the subject matter of the action pending in the other Court, there cannot exist in that Court an issue as to the title of that subject matter which is sought to be established in the other Court, and thus the issues in the two actions cannot be the same and the injunction herein was improperly granted.

To that end, it behooves us, at the outset, to examine and find out the subject matter of these respective actions commenced in the Courts of these respective States. *The subject matter of the action commenced by appellant in the State of California is the right to divert and appropriate certain of the waters of the Walker River in the State of California* (Trans., p. 9).

The actions commenced by the Rickey Land and Cattle Company in the Superior Court of Mono County, State of California, were to quiet the titles of that corporation to its water rights and appropriations from the Walker River in the State of California. It will readily be observed that the jurisdiction of the said Superior Court in the State of California in those actions was, of necessity, confined to a determination of rights existing in the stream in the State of California. The California Court had no jurisdiction to determine any rights in the Walker River in the State of Nevada, or between claimants of rights in the Walker River in the State of Nevada.

*Conant* vs. *Deep Creek Irrigation Co.,* 23 Utah, 627; 66 Pac., 188;
*Lamson* vs. *Vailes,* 27 Colo., 201; 61 Pac., 231.

The fact that certain persons, residents of Nevada, were made defendants in the California actions could not give the California Court any jurisdiction over any property, in the stream or otherwise, lying in the State of Nevada, or outside of the State of California; and the fact that defendants in said actions may have owned, or claimed to own, property in the Walker River in the State of Nevada, and, so owning, or claiming to own, property, had appeared in the California Court, could not give the last mentioned Court jurisdiction over those property rights in the State of Nevada. That was the very point met and decided in the *Conant* case. The

jurisdiction of the California Court is confined exclusively, and of necessity, to the California portion of the stream, and the action was commenced against appellees herein on the ground that they claimed an interest in said Walker River, not in the State of Nevada, but in the State of California, which was adverse to the Rickey Land and Cattle Company. The California Court obviously had no jurisdiction to determine as to any interest in the Walker River which citizens of Nevada or citizens of California claimed in the Walker River in the State of Nevada, but the California Court did have jurisdiction to determine as to interests in the stream in the State of California, whether the same were claimed by citizens of the State of California, or of the State of Nevada. The subject matter of the actions commenced in the Superior Court of the State of California was the water right of the Rickey Land and Cattle Company existing in that stream in the State of California. The fact that that stream flowed out of the State of California into the State of Nevada did not extend the jurisdiction of the California Court. It extended to the boundary line separating the State of Nevada from the State of California, and there it stopped, just as effectually as would have been the case were the State of Nevada a foreign country.

As above noted, the allegation of appellees' bill of complaint herein, on which the injunction is based, is that "The necessary effect of said actions brought by " appellant in Mono County, California, is to bring on

" for trial and determination in said Superior Court the " same issues as presented by the cross-bills of com- " plaint of your orators in the said suit of *Miller & Lux* " vs. *T. B. Rickey et al.,* theretofore brought and pend- " ing in the United States Circuit Court for the District " of Nevada" (Trans., p. 17).

It is clear and plain that the only issues made or presented by the actions commenced in the Superior Court of Mono County pertained to property rights and water rights existing exclusively in the said County of Mono, State of California; therefore if these issues are the same issues as were presented by the cross-bills in the original action commenced in the State of Nevada, then a portion, at least, of the subject matter of the said cross-bills filed in the Nevada Court must have been these very property rights existing in the State of California.

This, we contend, is impossible. We contend that it is no more possible for an action to quiet title commenced in the State of Nevada to have for its subject matter property situated outside of the State of Nevada, and in the State of California, than it is for these actions commenced in the State of California to have for their subject matter property situated outside of the State of California, and in the State of Nevada.

In other words, our contentions are, that the subject matter of the actions commenced in the State of Nevada was confined to rights existing in the stream in the State of Nevada. We do not question the jurisdiction of the United States Circuit Court for the District of Nevada

to absolutely determine and quiet appellees' titles and rights in the Walker River in the State of Nevada, as against citizens of the State of California as well as citizens of the State of Nevada, but we do question and deny that the United States Circuit Court sitting in the District of Nevada, or any other Court sitting in the State of Nevada, can determine or quiet any titles to water or any other real property of Miller & Lux or appellees herein, situated in the State of California. The fact that the stream in which these rights are claimed to exist rises in the State of California and flows into the State of Nevada cannot amplify the jurisdiction of the Nevada Court and empower it to extend up the stream across the boundary of the two States and determine questions as to the title and water right in that portion of the stream which is, and exists, in the State of California, and wholly outside of the State of Nevada.

In brief, appellant's contention is, that the subject matter of the original action filed by Miller & Lux in the United States Circuit Court for the District of Nevada, and of the cross-bills filed by appellees in said action, was confined to the rights of said Miller & Lux and appellees in said Walker River in the State of Nevada. If appellees or Miller & Lux have any rights in the said stream in the State of California by virtue of their appropriations and usure from the stream in the State of Nevada, these rights in the State of California are beyond the jurisdiction of the United States Circuit

Court for the District of Nevada, and can be protected by, and are, exclusively within the jurisdiction of the Courts of the State of California.

The application of this rule hereto might be more plain if appellees affirmatively alleged their rights to be in California. Suppose appellees should change their point of diversion and place of use of this appropriation to lands in the State of California, they would acquire no new rights in the stream in California. They then very obviously would be exercising rights in the stream in California—no new rights, but rights they now have—but rights which the Nevada courts, either Federal or State, can not protect.

In other words, we contend that the United States Circuit Court for the District of Nevada has no more jurisdiction to quiet and establish any rights that appellees may have in the Walker River in the State of California than the Court of Mono County, California, has to quiet and establish rights that the Rickey Land and Cattle Company may claim to have in the Nevada portion of the stream. Both actions are local and the subject matter of the Nevada action exists exclusively in the State of Nevada, and the subject matter of the California action exists exclusively in the State of California. One action is local to the State of California, and the other is local to the State of Nevada. Therefore, the subject matter of these actions being different, the issues, which are as to the titles of these respective subject matters, can not be the same, and the foun-

dation on which rests the decree appealed from does not exist.

## CONTENTIONS IN SUPPORT OF DECREE.

The assertion that the necessary effect of the actions commenced by appellant in Mono County is to bring on for trial and determination in the California Superior Court the same issues as presented by the said cross-bills of appellees herein, filed in the original action of *Miller & Lux* vs. *T. B. Rickey et al.,* is sought to be supported by two distinct lines of argument.

*One argument is based on the proposition that the subject matter of the cross-bills filed by appellees is an interest in the entire stream of the Walker River, both in Nevada and California.*

*The other argument is based on the proposition that the subject matter of the cross-bills is the land, or an interest or right in the land, on which appellees claim the right to use the water.* We will discuss these two arguments in their order.

We also contend that the subject matters of the cross-bills filed in the action commenced in Nevada and of the two actions commenced in California, are interests or rights in the stream, but our contention is further that the subject matter of the cross-bills filed in the action commenced in Nevada is confined to an interest or right in that part or portion of the stream which flows in the State of Nevada, and that the subject matter of the actions commenced in California is confined to an

interest in that part or portion of the stream which flows in the State of California. This conception of the subject matters of the two actions removes all possibility of any conflict of issues, as there is no common subject matter, the title of which is an issue in the two suits, the issues in one suit being confined to a subject matter wholly in California, and the issues in the other suit being confined to another subject matter wholly in the State of Nevada.

But it was argued before this Court that a stream flowing from one State into another is, by its very nature, an indivisible *res,* and being indivisible, and flowing in two States, it is just as much in one State as it is in the other State, and thus the courts of either State have concurrent jurisdiction over it.

No authorities are cited in support of this argument. We submit that it is unsound. A stream is no more indivisible than a piece of real estate, a roadway or railway, existing partly in one State and partly in another State. A railway running from one State into another or a road running from one State into another is in its nature just as indivisible as a stream running from one State into another, yet no court in a local action over a railroad or a wagon road in one tSate has held that it had jurisdiction over the railroad or a wagonroad in the other State by reason of the indivisible nature of the road or railway. The insufficiency of this argument based on the indivisible nature of a stream is clear-

ly set out by the case of *Miss. & Mo. R. R. Co.* vs. *Ward*, 67 U. S., 485.

Complainant in this action was the owner of steamboats navigating the Mississippi River and the action was commenced in the United States Circuit Court for the district of Iowa for a mandatory injunction to enjoin the maintenance of a bridge across the Mississippi River from the State of Iowa into the State of Illinois, and to abate the same as a nuisance. The piers of the bridge created eddies in the stream and obstructed navigation and thus interfered with the plaintiff's right to navigate the stream.

It will be observed that the boundary line dividing the States of Illinois and Iowa is the center of the Mississippi River and thus one-half of the stream and one-half of the bridge only were within the territorial limits of the jurisdiction of the United States Circuit Court for the district of Iowa. But if the stream is an indivisible thing, as was argued by counsel in the Miller & Lux case, there plainly could be no objection to the jurisdiction of the Circuit Court for the district of Iowa on the ground that one-half of the stream and one-half of the bridge were in the State of Illinois; but the Supreme Court of the United States did not view either the bridge or the stream as indivisible, and held that the boundary line of the State of Iowa was the limit of the court's jurisdiction, and thus determined that the court could neither inquire into, or adjudicate, concerning rights in the stream or the effect of the

bridge on the Illinois side, although it affirmatively appeared that one of the piers of the Illinois side created an eddy that obstructed navigation on the Iowa side of the river.

The absolute definite limitation of the power of the United States Circuit Court for the district of Iowa to make inquiry and act on facts existing only in the Iowa side of the river, and its absolute inability to inquire into the effect of the Illinois portion of the bridge as an obstruction to navigation, is set forth clearly in the following language:

> "This is a question that we cannot examine nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the Federal Courts across the Mississippi River by enlarging the Judicial district on either side, or it could confer concurrent jurisdiction on adjoining districts extending to trespasses and torts committed within the shores of the river. But the courts of justice can not do it unless authorized by an act of Congress."

Again, Mr. Justice Nelson, while dissenting from the majority opinion of the Court, which determined not to take any action in the premises by reason of the fact that it was powerless to reach the entire bridge, and thus dismissed the bill, agreed with the Court that the jurisdiction of the Circuit Court of Iowa was limited to that part of the bridge existing in the State of Iowa and used the following language:

"The east line of the State of Iowa, and which constitutes the boundary of the district of the Federal Court, and, of course, of its jurisdiction, is the middle of the Mississippi River; and the same line constitutes the west boundary of the State of Illinois, and, of course, the limit of the jurisdiction of the Federal Court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa, and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possesses any local jurisdiction over the entire river, and hence the idea that neither court is competent or equal to deal with the obstruction; and especially that the court in the Iowa district can not deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side."

As stated above, nothing can be conceived of as much more indivisible than a bridge, for divide a bridge and it is no longer a bridge, and in this case the stream of the Mississippi River was involved just as much as the bridge. The damage on which the action was based was produced by eddies in the river caused by the piers in the bridge; some of the piers being on the Illinois side, and some on the Iowa side. The true cause of the damage was the eddies in the stream, yet the Court held that the stream and its eddies was, as far as the jurisdiction of the court was concerned, abso-

lutely divided by the boundary line in the center of the stream.

It has been contended as distinguishing this case that this action being one to abate a nuisance the court was required to act on the object, which it could not where the object was outside the territorial limits of the court's jurisdiction. *But this is the very test of a court's jurisdiction over a subject matter—the power of the court to act on the res.*

This case stands as unquestioned authority and as good law today as when pronounced. Therefore there is no foundation for the argument that by reason of the indivisible nature of the stream, being partly in one State and partly in the other, the courts of both States have concurrent jurisdiction over the entire stream, and that thus an action may be commenced in the courts of one State to quiet title to an interest in the stream flowing in that State that will have the same subject matter and issues as an action commenced in the courts of the other State to quiet title to an interest in the stream in that State.

The argument based on the indivisible nature of the stream, and therefore the jurisdiction of the Nevada court over the entire stream, in California as well as in Nevada, was the main one urged by Miller & Lux in the case heretofore decided by this Court of the *Rickey Land and Cattle Company* vs. *Miller & Lux*, but this Court, in rendering its decision, took no notice of this line of argument and gave no weight thereto.

The second argument, namely, that the real subject matter of the action commenced in Nevada, was the land of Miller & Lux, which was deprived of the water, was adopted by this Court in rendering its decision and seems to have been made a basis for the decision rendered by this Court in the said case of the *Rickey Land and Cattle Company* vs. *Miller & Lux.*

This Court, after laying down the proposition that the original action commenced by Miller & Lux against T. B. Rickey *et al.,* was in the nature of an action to quiet title to real estate, continued:

> "Although the right to have the water of Walker River flow from above down to and within the complainant's canals and ditches, for use upon its lands, is an incorporeal hereditament, it is, nevertheless, under the foregoing authorities, *appurtenant to the realty in connection with which the use is applied. It savors of, and is a part of, the realty itself.* The suit, therefore, in its purpose and effect, *is one to quiet title to realty.* Complainant's diversion being in Nevada, and the use being upon *realty situated in Nevada,* and the suit being one *concerning or pertaining to that realty,* it is necessarily local in character and was properly instituted in the State of Nevada. See *Conant* vs. *Deep Creek, etc., Company, supra.* The proposition seems so clear that it is scarcely necessary to cite other authorities in its support. And it is equally clear that the courts of one State are without jurisdiction to hear and determine suits instituted in another for the adjustment of adverse claims respecting the

*legal title to realty, and which pertain to the realty as the subject matter of the controversy.*" (Italics ours.)

While we do not agree with the definition of the subject matter of the original action of *Miller & Lux* vs. *T. B. Rickey et al.,* as set out in the above quotation, there is nothing therein that conflicts with any contention urged by appellant herein, or, for that matter, with any contention that was urged by appellant in the case of *Rickey Land and Cattle Company* vs. *Miller & Lux.*

To the contrary we respectfully submit that the very definition of the subject matter of the Nevada actions as something concerning or pertaining to some right or interest in the lands in Nevada, precludes any possibility for the same issues to be presented in the California action as presented in the Nevada action, for by no possibility could the California action present any issue as this subject matter.

Thus let us assume that the action commenced in the United States Circuit Court for the district of Nevada was "one concerning or pertaining to that realty," namely, the lands of cross-complainants in Nevada, and thus had as its subject matter those lands or some interest or right in those lands. The subject matter was, as the Court says, "necessarily local in character," and local to Nevada. If the land, or something that concerns or pertains to the land in Nevada, is the subject

matter of the Nevada action, the issues of the Nevada action are as to the title to this *res,* that is some interest in this land or part or parcel of this land in Nevada, and thus by no possibility could these same issues be presented by the actions commenced in California. The California court has no jurisdiction over this *res* in Nevada and could entertain no issues as to its title. Thus it follows, from the very rule laid down by this Court, that it would be absolutely impossible to present the same issues in the action in California as were presented by the cross-bills.

But, in order that the law governing this case may be clear, we respectfully submit that the property right, a portion of which is the subject matter of the cross-bill, is not the land, or anything that is part or parcel of or that necessarily inheres or pertains to the land or any interest in the land of cross-complainants in the State of Nevada, but is a right and interest in the water of the entire stream of the Walker River, independent of and not tied to or necessarily connected with any particular piece of land or the title to any piece of land, a part of which right exists in the stream in the State of Nevada and a part of which exists in the stream in the State of California. While the action was one to quiet title, and to quiet title to realty, the realty, the title of which was to be quieted, was not the lands on which the water happened to be being used at the time the bill was filed, or any interest in these lands, but was a water right in the stream.

We respectfully submit that the subject matter of the action commenced by Miller & Lux in the United States Circuit Court for the district of Nevada was the water right, or right to the waters of the Walker River, claimed to be owned by said Miller & Lux, and likewise the subject matter of the cross-bills filed by appellees in the said action pending in the United States Circuit Court for the District of Nevada was the water right, or right to use the waters of the Walker River, claimed to be owned by appellees, and not anything that necessarily savored of, or was part and parcel of the said Miller & Lux and appellees' lands in Nevada, or that necessarily concerned or pertained to those lands, as their subject matter.

Take the description of the subject matter of appellees' cross-complaints as set out in the complaint herein. It is in the following language: "*Said cross-bills* " *alleged, among other things, that they were, and for* " *a long time prior to that time had been, the owners* " *of certain rights in the waters of the said Walker* " *River and certain appropriations made by them and* " *their grantors and predecessors in interest.*" (Trans., pp. 14-15.) Nothing is said about any lands of cross-complainants. The subject matter as set out in the cross-complaint is simply, "*Certain rights in the waters* " *of the said Walker River and certain appropriations* " *therein.*"

But even if appellees had mentioned their lands in connection with their water right, that would not have

altered the nature of the subject matter which appellees sought to protect and have the title to quieted, when they filed the cross-bills in said action in Nevada. A water right acquired by the appropriator is not necessarily appurtenant to any particular piece of land in connection with which it is used. Nor can it be considered as a part of the land for the purposes of an action to establish or to quiet its title.

No rule of law is better established than that an appropriator may change his point of diversion and place of use of the water at will. He may use the water on these lands today, and then use the right in connection with, and for the benefit of, other lands tomorrow, without in any manner impairing or losing his right.

*Hargrave* vs. *Cook,* 108 Cal., 80.
*Kidd vs. Laird,* 15 Cal., 180.
*Davis* vs. *Gale,* 32 Cal., 26.

But let us assume that a water right is "a part of the " realty itself," to which it is appurtenant; then, if that is the case, an appropriator who has obtained a decree quieting, establishing, and protecting his title to a water right used on certain lands, would immediately lose the benefit of his decree should he change his place of usure and apply the water to other and different lands than those to which his right was quieted as a part thereof. That is to say, to turn to the plat heretofore referred to, assume that Nichol *et al.,* appellees herein, obtain a decree establishing their title to waters appro-

priated and used on the lands indicated on said plat as "land of Nichol *et al.*" If the subject matter the title to which has been established by that decree is parcel of those lands and is one concerning or pertaining to those lands, then, should Nichol *et al.,* thereafter decide to change their place of usure of said water and use it on the tract of land indicated on the plat as "X land," they would forfeit all benefits of any decree obtained. It is obvious that a decree establishing and protecting something that is parcel of, or which necessarily pertains to or concerns the tract of land described as Nichol land could not be relied upon to protect an interest that necessarily savors of and is a part of an entirely different tract of land, designated as "X land." Yet no one would contend that an appropriator would lose the benefit of a decree establishing his right by simply changing his place of usure.

Thus it is clear that the water right in the stream is the principal thing, and the lands on which, or for the benefit of which, the water may happen to be being used at the time the action is commenced, is merely an incident. Thus it was said by the Supreme Court of the State of California in the case of *Jacobs* vs. *Lorenze,* 98 Cal., p. 340-341, "appellant's contention that the wa-
" ter right *must be* appurtenant to a certain ditch, is
" not sound. The water right is the principal thing,
" and if either is appurtenant to the other, the ditch is
" appurtenant to the water right, and as the water

"may be used through any ditch, the question be-
"comes unimportant."

The subject mattter to be protected was the right in the stream. The lands described in the complaint are merely incidental to the right. It is true a man can not acquire a water right without putting the water to a beneficial use on certain lands, but the lands and the use of the water come into the case merely as evidentiary matter to establish the right. A water right is acquired by a beneficial use on lands. A water right is proved in a court by proving a beneficial use of the water. The ultimate fact in the case is the application of the water to a beneficial use. The evidentiary facts consist of lands, and the economical and beneficial application of the water on the lands. It is not even essential that the man acquiring the water right own any interest or title in the lands on which the water is used, and by virtue of the use of which he acquires the right.

*De Necochea* vs. *Curtis,* 80 Cal., 397.
*Ramelli* vs. *Irish*, 96 Cal., 214.

In *Davis* vs. *Gale*, 32 Cal., 26, the rule is thus laid down:

> "Appropriation and use of water for beneficial purposes are the tests of right in such cases, and not the place and character of the particular use."

"Appropriation, use, and non-use are the tests of the right."

*Mitchell* vs. *Canal Co.,* 75 Cal., 464.

Thus it is clear, that except as a matter of evidence as one of the probative facts essential to the proof of the beneficial use of the water of a stream, the existence of the particular lands on which the water is used is immaterial. The essential thing to be established and protected is the water right. The subject matter of the action is the exclusive right to take a specific quantity of water from the stream, not at a particular point, or for the benefit of, or to be used upon, any particular tract of land or lands, but upon any land, or at any point on the stream, as the owner of the right may desire.

We respectfully submit that the doctrine announced in the case of *Rickey Land and Cattle Company* vs. *Miller & Lux,* that the subject matter of an action brought by an appropriator of water to protect his water right is something that *savors* of and is a *part* of the land, or is *concerning* or *pertaining to the land,* is without foundation in precedent, or authority. All authorities are that a water right is an interest in a stream from its source to its mouth. As was said in the case of *Cole* vs. *Richards Irrigation Co.,* 75 Pac. (Utah), 378:

"It is settled in this arid region by abundant authority that when the waters of a natural stream

> have been appropriated according to law, and put to a beneficial use, the rights thus acquired, carry with them an interest in the stream from the points where the waters are diverted from the natural channel to the source from which the supply is obtained, and any interference with the stream by a party having no interest therein, that materially deteriorates the water in quantity and quality previously appropriated, to the damage of those entitled to its use, is unlawful and actionable."

To sustain the decree herein this Court must hold that the subject matter of the cross-bills filed by appellees in the original action brought by Miller & Lux in the United States Circuit Court for the district of Nevada was an interest in the stream of the Walker River, both in the State of California and in the State of Nevada, and that the Nevada court had jurisdiction over the interests in the stream in California as well as the interest in the stream in Nevada. We do not question the power of the United States Circuit Court for the district of Nevada to protect and establish and quiet the title to any interest in the stream that may exist in the State of Nevada, but we do unequivocally deny the power of that court to adjudicate any interest that Miller & Lux may claim in the stream in the State of California. This is the function of the California courts, either State or Federal.

As above noted, there is no room for any conflict of jurisdiction over this stream and property therein, in

the courts of the respective States. The courts of one State have jurisdiction over that part of the stream which exists in that State, and the courts of the other State have jurisdiction over the rights in that part of the stream that exists in that State. There being no concurrent jurisdiction, there is no possibility for a conflict.

The issues made in the action in the courts of California pertain to a subject matter, rights in a stream, in California, and issues made in the courts of Nevada pertain to another and distinct subject matter, namely, rights in the stream in the State of Nevada. Thus the issues are no more the same issues than are the issues in any two cases involving distinct property and subject matter, the same issues.

*The fact that the actions brought by appellant in Mono County are to quiet and establish the Rickey Land and Cattle Company's right to divert water from the Walker River in the State of California, together with the fact that as a result of appellant's diversion of water from the stream in California the appellees may not be able to divert the amount of water from said stream in Nevada that they are entitled to, does not cause the subject matter and issues of the actions in California, which are the rights in the stream in California, to become the same subject matter and issues that are presented by the cross-bills filed in the action in Nevada.* It is true that the subject matter of these

two actions, in California and Nevada, respectively, is quite closely related, inasmuch as the flow of the stream in Nevada is dependent upon the flow of the stream in the State of California, but that dependency does not make them one and the same. This argument is simply that of the indivisible *res* over which both courts have concurrent jurisdiction, which is clearly to the contrary of the decision in the case of *Miss. & Missouri R. R. Co.* vs. *Ward, supra.*

An unlawful diversion in California diminishes appellees' rights in the stream, both in Nevada and California, lessening the flow of the stream in California, and as a consequence, lessening the flow of the stream in Nevada. Violating and injuring appellees' rights in the stream in the State of California may cause undoubtedly a resultant injury to appellees' rights in the State of Nevada, but that does not change the location of the rights that are directly injured by appellant. The right of the appropriator is to have the water flow uninterrupted down the stream to the point where he desires to divert it. It exists in the stream right up to the source and is there absolutely fixed at all times, and as the water flows down to the appropriator's point of diversion, it flows subject to this right. Appellant's diversion in California if a trespass, is one committed on appellees' rights to have the water flow down this stream in California toward their point of diversion. There is the direct injury, and there is where appellees must have protection irrespective of

whether they desire to divert the water from the California or the Nevada portion of the stream. If appellees can protect their rights in California, then they may receive the amount of water they are entitled to and desire to divert in the State of Nevada at the State line dividing the two States.

If the water is diverted by trespassers before it reaches the appropriator's point of diversion, the direct injury to the right to have the water flow down the stream occurs right at the point where the trespass occurs. As a result of that direct injury there may be a series of consequential injuries extending on down the stream, as there is less water in the stream to divert lower down; smaller crops on the land where the appropriator may use the water; less work for the farmer and his hired men; less clothes, food, and luxuries for the farmer's family and himself; less beef or potatoes for the inhabitants of cities, and consequently more hunger; and so the chain of consequential injuries may be traced, but the direct injury is to the right to have the water flow uninterrupted down the stream, which right exists in the stream from its source down to the appropriator's point of diversion.

Thus appellant's action to quiet title to its rights in the stream in California, if it affect appellees' right in the stream, affects solely the right which appellees have in the stream in the State of California, and the fact that as a result of appellees' losing this right in the stream in the State of California they may be un-

able to enjoy the same privileges that they may have been enjoying, or are entitled to enjoy in the stream, in the State of Nevada, does not change the location of the rights of appellee involved in the California action from the State of California into the State of Nevada.

*Appellees' rights that are directly affected by the California actions are rights to have the water flow uninterrupted down the stream in the State of California toward the place where appellees may desire to divert the water whether in California or Nevada.* For instance, supposing that appellees, instead of desiring to appropriate this water in the State of Nevada, desire to appropriate it in the State of California. This, as we have pointed out above, may be the fact in this case, as appellees nowhere set out herein where they desire to divert the water, the right to which they are seeking to protect by the cross-bills. From the complaint herein, as above noted, it simply appears that the Walker River flows through and out of the State of California into and through the State of Nevada, and appellees claim certain rights to appropriate water somewhere in this stream, which may be in California, or may be in Nevada, and to protect which rights the cross-bills were filed in the action in Nevada. As above noted, it is obvious that if appellees desired to divert this water in California, the Nevada court had no jurisdiction to protect them, having clearly no jurisdiction over controversies relating entirely to rights in the stream in the State of California, and if both parties desire to

appropriate the waters of the stream in the State of California, it would be absolutely clear that the rights of both parties there in conflict were entirely in the State of California and beyond the jurisdiction of the Nevada court.

*Conant* vs. *Deep Creek Irr. Co., supra.*

Therefore let us assume that appellees desire to exercise their rights in this stream and make their appropriation and diversion in the State of California, then, beyond question, appellees' rights in the stream are in the State of California. Then let appellees change their point of diversion and usure down the stream onto lands in the State of Nevada. By so doing, have they lost their rights in the State of California? Or, have they not the very same rights in the stream in the State of California that they had before they changed their point of usure? We respectfully submit that they have. They have lost no rights in the State of California by changing their point of diversion and usure to a point lower down the stream, and in the State of Nevada, and they can at any time change their point of diversion and usure back up the stream into the State of California, which they could not do if they did not still have rights in the stream in said latter State. By changing their point of diversion and usure from the State of California to a place lower down on the stream, and in the State of Nevada, they may acquire rights in the stream in the State of Nevada, viz., to have this water

flow uninterrupted down the stream in the State of Nevada, that they did not have when they were diverting all the water they were entitled to in the State of California. The acquisition of these new rights to have the water flow down the stream in the State of Nevada that result from appellees changing their point of diversion and usure from a place up the stream and in the State of California to a place lower down on the stream and in the State of Nevada, does not carry with it the sacrifice or loss of any rights in the stream in the State of California. These rights to have the water flow down the stream in the State of California are there, just as much as they ever were, and any action that has as its subject matter rights in the stream in California may affect these rights, but the rights affected are just as much in the State of California in the case supposed after the point of diversion and place of usure has been transferred from the State of California down the stream into the State of Nevada, as it was prior to the change of the place of diversion and usure, and when both parties claimed to use the water in the State of California.

To reiterate what has been said before, the right in the stream is to have the water flow uninterrupted down to the point of diversion. That right is in the stream from its source to the owner's point of diversion. As a result of the injury to that right at a point up the stream in the State of California the owner may be unable to enjoy the right to its fullest extent farther down the

stream in the State of Nevada, but the location of the right to have the water flow down the stream uninterrupted in the State of California injured by the diversion in the State of California and the location of a right involved in an action to determine rights in the stream in the State of California is in no wise moved down the stream from the State of California into the State of Nevada by reason of the fact that the appropriator may desire to divert the water from the stream in the State of Nevada instead of in the State of California. His right is to have the water flow uninterrupted down the stream to his point of diversion and appropriation. If his point of diversion is in California, his right only exists in California, but if his point of diversion is lower down the stream in Nevada, his right extends down the stream into the State of Nevada as well as in the State of California, for the water, to reach him, must flow through the State of California and then down through the State of Nevada.

If the appropriator desires to divert the water in the State of California, the courts of California can give him complete protection, but if he desires to appropriate the water in the State of Nevada, the courts of California can protect his right to have the water flow down the stream in the California portion of the stream, but the courts in California can not protect his right to have the water flow down the stream in the Nevada portion of the stream. For this protection and the establishment of these latter rights, he must go into

the courts of Nevada, which are the only courts having jurisdiction thereof.

*Just as the courts of California can not protect the appropriator's right to have the water flow down the stream through the State of Nevada, likewise the courts of Nevada can not protect the appropriator's right to have the water flow down the stream through the State of California. If it is the right to have the water flow uninterrupted down the stream through the State of California that is involved, appellees must go to the courts of the State of California for protection, and the fact that as a result of the invasion of their rights in the stream in California they have less water to divert from the stream in Nevada, does not change the location of the right to have the water flow uninterrupted down the stream in the State of California.* The rights to have the water flow down the stream in the State of California are in California, irrespective of the location of more or less direct or indirect consequences of an invasion of the rights to have the water flow uninterrupted down the stream in said State, which consequences, as above noted, may exist in the State of Nevada, and may exist in the City of San Francisco. The right injured is in California.

The precise point under discussion was involved in the case of *Stillman* vs. *White Rock Mfg. Co.*, 23 Fed. Cases, p. 83. In this case a stream flowed between the State of Rhode Island and the State of Connecticut. Plaintiff owned certain mills on the Connecticut side

of the stream and the defendant diverted water on the Rhode Island side of the stream. The action was brought in the United States Court for the district of Rhode Island to enjoin the diversion, and the question of the jurisdiction of the Rhode Island court over the subject matter of the action was put in issue. The Court made it clear that the rights involved in that action were in the stream in Rhode Island, pointing out that as a result of defendant's diversion and invasion of complainant's right in the State of Rhode Island there might result a consequential injury to complainant in Connecticut, but the direct injury and the rights directly involved were located in the State of Rhode Island. The Court quite extensively discussed the questions there involved in the following language:

> "Whether such injuries are to be considered as done to the soil and freehold of the owner on the side where that is situated, or to some corporeal easement or right incident to that which he enjoys undivided in the use of the whole water in the river in its natural flow or bed going across the center, and being entitled beyond it to have the water employed only to the extent of one-half in quantity, would not in most cases be very material. If both sides of the river were situated in the same State, under the same laws, or were within the jurisdiction of the same courts, then to discriminate as to the precise extent and locality of the injury for which the action was brought would often be of little importance. But here, unfortunately, different States

and different laws in some respects govern the two sides, and different circuits of this court possess jurisdiction on each side no less than different State courts.

"It becomes necessary, therefore, to ascertain now, what is the interest, if any, which the complainants by owning land on the Connecticut side of the river are entitled to in the water on the Rhode Island side; and, indeed, this becomes almost the whole gist of the controversy. After careful inquiry this interest seems to me to be such a corporeal easement or right as has just been described to an undivided half of the water on that side, as well as on the other side. A fence or embankment can not be usually made in the middle of a large stream where the right to the soil terminates; and if made, it would not correspond with the true interests each owner on the banks has to some extent in all the flowing water between those banks. Hence it is reasonable to regard these interests in the whole stream to be an undivided half, or tenancy in common, and if either side uses or takes out more than half, or at a place above removes and diverts large quantities from coming at all to the dam where the complainants are interested, their proportionate interests in the whole stream are injured, and an action of some kind or other must lie for redress somewhere. *Ang. Water Courses*, p. 11, Sec. 3, and cases there cited; *Webb* vs. *Portland Mfg. Co.* (Case No. 17,322). Probably different forms of action may lie, as redress is sought for different views of the injury, and these different actions may be brought properly in one State or the other, as they relate more immedi-

ately to the acts done as affecting the land and mills the plaintiffs own in Connecticut, or as affecting the undivided share in the water on the Rhode Island side, which the plaintiffs also own. The canal here being on the Rhode Island side, and first injuring the rights of the plaintiffs there to an undivided half of the stream, would seem to justify an appropriate remedy there for that particular wrong.

"*The injury thus far and in this view may be regarded as committed on interests possessed in the water beyond the center of the stream,* and not entirely on or to the mill and land situated upon one of the banks, or to merely that half of the stream which is contiguous. Such interests may exist in water and its use. 2 N. H., 259. *The first and direct injury, then, is to the easement and consequent rights existing beyond the center. The next consequential injury would be to the mills and land adjoining the stream before reaching the center on the Connecticut side, and an appropriate remedy for that would lie there.* Thus a right of way on land in one State to a farm in another is an interest situated in the first State and an obstruction to it may be there prosecuted. There is nothing in the nature of easements or services attached to other property which makes them and the property identical in their locality. Nature fixes the locality of each, and one may be in one town, county or State, and the other as well be beyond the dividing line in another, though contiguous, and a suit lie in the other for the injury committed there. 7 *Coke,* 62.

"The chief error in the position of the respondents is in supposing that the planitiffs have *no rights*

*whatever beyond the center of the river, or no interests to be protected there."* (Italics ours.)

See also

*Bannigan* vs. *City of Worcester,* 30 Fed., 394.

*This Court can not affirm the decree herein which was awarded on the necessary ground that the subject matter of the action commenced by appellant in the State of California is the same as the subject matter of the cross-bills filed by appellees in the State of Nevada, without ruling directly in conflict with the decisions announced in the cases of*

*Howell* vs. *Johnson,* 89 Fed., 559.
*Morris* vs. *Bean,* 123 Fed., 618.
*Hoag* vs. *Eaton,* 135 Fed., 411.
*Anderson* vs. *Bassman,* 140 Fed., 14-20.

These cases all hold that the right of appellees to have the water flow down the stream in the State of California exists in the State of California. If that were not the case, the Federal Court, in all these cases, would not have had jurisdiction over the subject matter therein being litigated. In each one of these cases the appropriator on the stream in the lower State brought the action to protect his rights in the stream and enjoin the diversion from the stream in the upper State in the courts of the upper State. These actions were presented on bills of complaint of precisely the

same nature as the original bill of complaint in the case of *Miller & Lux* vs. *T. B. Rickey et al.,* which this Court has, as we believe, correctly denominated an action to quiet title to real property and a local action. If the rights involved in those actions did not exist in the stream in the upper State, then it follows that the courts in each of those actions had no jurisdiction over the subject matter thereof.

But we submit that the decisions of the Court in those cases were correct. The rights therein involved were rights in the stream in the upper State, just as are the rights involved in the actions commenced by appellant herein in Mono County, California, to quiet its title to the waters of the Walker River in the State of California.

Supposing that appellees herein had gone into the United States Circuit Court for the northern district of California and commenced an action against appellant herein to enjoin appellant from diverting the water of the Walker River in the State of California, and set up their rights and appropriations in said Walker River, where would have been the subject matter of that action? Clearly it would have been exclusively in the State of California. Should appellees prevail, the said court of California would have jurisdiction to protect their rights to have the stream flow uninterrupted through the State of California, but the power of the California courts to protect appellant's rights in the stream would stop at the State line. It could deliver

the water at the State line but no further. Appellant might, if such a decree were rendered in the court in the State of California, set up a claim to the water in the stream in the State of Nevada, and above appellees' point of usure in the State of Nevada, and the decree in the court of the State of California could in no wise determine rights in the stream in the State of Nevada or protect appellees' rights to have the water flow uninterrupted in the stream through the State of Nevada. To do this, appellees would have to have recourse to the courts of the State of Nevada.

As the rights and subject matter involved in the four cases above cited were within the jurisdiction of the respective courts, then it follows of necessity that the rights involved in the actions commenced by appellant State of California. If these same rights and this same subject matter is within the jurisdiction of the court sitting in the State of Nevada, then it of necessity follows that the courts of the two States have concurrent jurisdiction over this subject matter, which is impossible, as Congress has not enlarged the jurisdiction of the Federal courts through whose districts interstate streams flow so as to include rights in the stream outside of the district of the court as well as rights in the stream within the district of the court.

If the courts in the above cited cases had jurisdiction, they had jurisdiction because there were rights involved in those actions that were located in the stream in the upper State. Whatever those rights were, they could

not be protected by the courts of the lower State because they were beyond the jurisdiction of the courts of the lower State. Those were the rights of appellees that were involved in the actions commenced by appellant in Mono County, California, and none of those rights are involved in the actions pending in the State of Nevada wherein appellees filed their cross-bills. Thus the subject matter of the actions is distinct and by no possibility could the two actions, having different subject matters, present the same issues; the issues in each action being as to the title of the respective subject matter therein being litigated.

In other words, suppose appellees, or Miller & Lux, in addition to bringing the action in Nevada had also brought an action in the State of California. Would there have been any conflict between the two actions? Manifestly not. The action brought in the State of Nevada has for its subject matter the protection of rights in the stream in the State of Nevada, and the action brought in the State of California would have as its subject matter the protection of rights in the stream in the State of California. By virtue of the two actions Miller & Lux and appellees would establish and protect their entire rights in the stream in California as well as in Nevada, but they could not do this otherwise. By commencing an action in California they could not protect their rights in the stream in the State of Nevada, and likewise, by commencing an

action in the State of Nevada they could not protect their rights in the stream in the State of California.

*To sustain the decree herein, it is necessary to apply the doctrine of lis pendens. To do so this Court must hold that that subject matter of a local action commenced in the State of Nevada is real property situate in the State of California.* The cross-bills herein are filed against T. B. Rickey, who was the defendant in the original actions commenced by Miller & Lux on June 10, 1902. On August 6, 1902, T. B. Rickey transferred his lands and water rights in the State of California to the Rickey Land and Cattle Company, appellant herein, and the actions, the prosecution of which is herein enjoined, were brought by the Rickey Land and Cattle Company.

*For the doctrine of lis pendens to apply, there must be a transfer of a res which is the subject matter of an action pending.* The *res* transferred from T. B. Rickey to the Rickey Land and Cattle Company was situate only in the State of California and thus wholly outside of the territorial limits of the jurisdiction of the Nevada court, and thus the *res* transferred could not be the subject matter of the cross-bills filed by appellees in that action, yet the *res* transferred was the subject matter of the action in the Mono County suits, and thus it follows that the subject matter of the action of the Mono County suits is not the subject matter of the Nevada action.

The theory on which the decree herein was rendered is that unseemly conflicts between courts should be avoided and prevented. Our answer is, that, if the courts of the State of Nevada take upon themselves the function of deciding as to titles to an interest in a stream flowing in the State of California, the necessary result of such a procedure will be unseemly conflicts between courts.

In California the doctrine of riparian rights in streams prevails, which doctrine is a part of the law of the State. In the State of Nevada the doctrine of riparian rights is not recognized. If the courts of the State of Nevada are going to take upon themselves the deciding of titles in streams flowing in the State of California, it is more than probable that their decision will be in conflict with the decision of the California courts on the rights in the stream and we will have nothing but unseemly conflicts between courts.

But let the law be as we here contend. Let the Nevada appropriator have recourse to the courts of the State of Nevada to protect his rights in the stream in the State of Nevada, and let him have recourse to the courts of California, State or Federal, to protect his rights in the stream in the State of California, and all will be harmonious and without conflict.

## REVIEW OF THE DECISION OF THE CIRCUIT COURT OF APPEALS.

Before concluding this argument we deem it necessary to further discuss the conclusions and argument of the Circuit Court of Appeals in the case of *Rickey Land and Cattle Co.* vs. *Miller & Lux,* 152 Fed., 11. By doing so, we will put to the test the arguments made herein. The first two pages of that opinion are devoted to an undisputed proposition, namely, that the right to have water flow in a river to the head of a ditch is an incorporeal hereditament appurtenant to the ditch, or to the land upon which the use of the water is had.

This statement does not in any degree tend to locate the easement in the stream to which the incorporeal hereditament is attached. From the authorities cited the easement is not confined to any particular section of the stream, but is impressed upon the stream from its source to the head of the particular ditch. It is not undissolubly annexed to any particular ditch or to any particular land. The easement in the water may be transferred from a present owner to another, and the present owner or such transferee may change the place of use or diversion so that the right is appurtenant to other lands or other ditches. Whatever changes are made in this respect, the location of the easement remains the same. It always remains a right in the particular stream.

It follows, therefore, that the determination of what particular land the easement is appurtenant to at any particular time does not in any manner determine or change the location of the easement.

The Court therefore made no progress toward the question of *jurisdiction* when it arrived at the conclusion that the right to have water flow to the head of a ditch was an incorporeal hereditament and was appurtenant to certain lands in the State of Nevada. The easement was in the stream and the stream was definitely located by nature, and this controlling fact can not be changed.

This easement claimed by Miller & Lux attached to the entire stream above the ditches of Miller & Lux. A part of this was in the State of Nevada and a part was in the State of California. To the part in the State of Nevada appellant disclaims all interest. To the part in the State of California it asserts a right.

The Court of Appeals determined expressly that the original suit by Miller & Lux "is one to quiet title to " realty," and that the right to water was to be treated as real estate, and further that the court of Nevada could not quiet the title to land in the State of California.

It occurs to us that these conclusions should lead directly to a reversal of the decree appealed from and not to an affirmance of it. The subject matter of the Mono County case in California was unequivocally real estate in the State of California. This Court concluded

that the Nevada court had no jurisdiction to quiet the title to this land. How then did the Court arrive at a conflict of jurisdiction between the two courts?

The reasoning of this Court supporting the jurisdiction is as follows, see page 17:

> "The appellant's counsel maintain that, because the appellant has set up in its answer and cross-bill to the original suit that it has an appropriation in California for the purpose of irrigating lands in that State, therefore the court in Nevada has no jurisdiction to determine its rights in the State of California. The contention seems to us to be beside the question. The defendant will not be permitted, by thus setting up a cause of suit in the State of California, to defeat the jurisdiction of the court in the State of Nevada. The complainant must be permitted to proceed upon the case made by its pleadings, and the [illegible] jurisdiction by alleging [illegible]antity of the waters of the which may conflict with the [illegible] is beyond the jurisdiction ant. It may be said that the co[illegible]sking the Court not the power to quiet the title of the [illegible] in another the State of California. But the defend[illegible] right to set up its conflicting interests, whi[illegible] in California, as a defense against the atte[illegible] the complainant to have its title in Nevada qu[illegible] because the complainant's title must depend up[illegible] whether it has the better right as against the de[illegible] fendant—the rights of the parties arising in the States in which their respective interests are found. So that the answer and cross-complaint of the defendant can only operate defensively in the orig-

inal suit, and not to give the defendant a right to have its title also quieted in the State of California. Though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look, nevertheless, under the defensive answer to the appropriation in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and, if not, then to settle and quiet complainant's title and rights thereto.

"That our position may be fully understood, we will extend the discussion a little. The water in the stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary State or county lines, and is a thing in which no man has a property until captured to original case, ... e. The right of appro- swer or cross-bill, we do ... law, which means the right part of the opinion ... use. It is the right, not to any of action in an ..., but to some definite quantity of that the jurisdi... y at the time be running in the stream. So ... gnt acquired by an appropriation includes the to a ca... t to have the water flow in the stream to the if M... oint of diversion. The fact of a State line intersecting the stream does not, within itself, impinge upon the right. In other words, the appropriation may still be acquired, although the stream is interstate and not local to one State; nor will the mere fact that the stream has its source in one State authorize a diversion of all the water thereof as against an earlier and prior appropriator across the line

in another State. On the contrary, one who has acquired a right to the water of a stream by prior appropriation, in accordance with the laws of the State where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different State. *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411; *Anderson* vs. *Bassman,* 140 Fed., 14. So that in determining the right of appropriation in one State, it may become necessary to ascertain what are the rights in another, and a mere assertion of rights in the courts of the latter State can not operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson* vs. *Hassam, supra.* 'It is objected by the defendants,' says Morrow, Circuit Judge, 'that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the Court to pass upon titles to real property in another State.' "

As the whole decision rests upon this part of the opinion we desire to follow this reasoning sentence [illegible] sentence to see wherein its error lies.

We are unable to understand what is alluded to in this language:

"The appellant's counsel maintained that because the appellant has set up in its answer and cross-bill

to the original suit, that it has an appropriation in California for the purpose of irrigating land in that State, therefore, the court in Nevada has no jurisdiction to determine its right in the State of California. The contention seems to us beside the question. The defendant will not be permitted by thus setting up a cause of suit in the State of California to defeat the jurisdiction of the court in the State of Nevada."

There was no allusion to the answer of the defendant Rickey in the record and no argument was predicated upon any issue made by the answer, and there was no cross-bill whatever filed by Rickey in the original suit. We are unable to account for this statement in the opinion. Unless the Court intended to treat the complaints in Mono County as standing in the same relation to the original case, as would such facts if stated in an answer or cross-bill, we do not know how to apply this part of the opinion. Manifestly to so apply a cause of action in another State, would be to make it a plea to the jurisdiction, not of a cause of action in Nevada, but to a cause of action in the State of California. And if Miller & Lux had expressly stated a cause of action for the water in the State of California, the plea would have been sustained.

The next sentence is also predicated upon the same conception:

"Complainant must be permitted to proceed upon the case made by its pleadings and the defendant

> can not defeat the jurisdiction by alleging that it has rights elsewhere which may conflict with the rights of the complainant."

It is observed that the Court uses the words "can not " defeat the jurisdiction." That is true, but this assumes that there is a jurisdiction to be defeated, the very question to be determined in this case. We are contending that the court has no jurisdiction, not that we have power to defeat such jurisdiction as the court has.

The next sentence: "It may be said that the court in " Nevada has not the power to quiet the title of the de- " fendant in the State of California." With this statement there is no controversy, but we do further contend that the court of Nevada has no power to quiet the title of the complainant, *Miller & Lux,* in the State of California, and because the court has no such power regarding the title of *Miller & Lux* to the water in the State of California, therefore there could be no conflict of jurisdiction between the two courts.

The opinion proceeding says:

> "But the defendant has the right to set up its conflicting interests which arose in California [which *are* in California, they never were in Nevada], as a defense against the attempt of the complainant to have its title in Nevada quieted, because the complainant's title must depend upon whether it has a better right as against the defend-

ant, the rights of the parties arising in the States in which their respective interests are found."

We think this sentence suggests the fallacy of the opinion. It involves this proposition that the title of the plaintiff in the State of Nevada is determined by the title of the defendant in the State of California. This is specious in this, that it turns the subject of universal inquiry, *the title of Miller & Lux,* and looks at it from the standpoint of the title of the defendant. The defendant's title or right to use the water is not the question for adjudication.

If we keep in mind at all times that we are inquiring into the title of Miller & Lux in and to the water, and that the title of Miller & Lux is at all times the subject matter of the action in Nevada, this statement in the opinion should read: "but the defendant has a right to "set up its conflicting interests which are in California "as a defense against the attempt of the complainant "to have its title in Nevada quieted, because the com- "plainant's title in Nevada must depend upon whether "it has the better title as against defendant *in the State* "*of California.*"

The rights of the parties both attaching to the stream in the State of California; that is to say, the title of Miller & Lux in the State of Nevada depends upon the title of Miller & Lux to the water in the State of California.

By determining what the title of the defendant Thomas B. Rickey is to the water in the State of Cali-

fornia is only another way of determining what is the title of Miller & Lux to the waters in the State of California. After determining the rights of Rickey in the State of California, we arrive at the rights of Miller & Lux by elimination, but the method of proof does not change the subject of inquiry, which at all times is the title of Miller & Lux.

It is admitted, however, that this inquiry as to the title of Miller & Lux in the State of California cannot be made by the court in Nevada, and this conclusion cannot be avoided by a declaration that the inquiry is not to determine the rights of Miller & Lux to the stream in the State of California, but is made for the purposes of determining the rights of Miller & Lux in the stream in the State of Nevada.

In other words, Rickey, disclaiming any rights whatever in the stream in the State of Nevada, concedes the title of Miller & Lux to that part of the stream, and only challenges the interests of Miller & Lux in the State of California, which he at the same time says the courts of the State of Nevada have no jurisdiction to try and determine.

A further test of the fact is that when the rights of Miller & Lux are quieted in the State of Nevada, the only contemplated trespass upon the rights in the State of Nevada are to be made by physical diversions of the water in the State of California.

Miller & Lux claims an easement in the stream from their ditch in Nevada to the source of the river. Rickey

claims an easement in that part of the stream only in the State of California. Why should it be said, therefore, that in determining the rights of Rickey in the State of California you are not at the same time determining the rights of Miller & Lux in the State of California? The very paragraph of the opinion above quoted asserts that Miller & Lux rights attached to the stream in the State of California.

The next sentence of the opinion, "so that the an-" swer and the cross complaint of the defendant can " only operate defensively in the original suit, and " not to give the defendant a right to have its title also " quieted in the State of California." We fully agree that the court of Nevada cannot quiet the title of the defendant, nor for that matter, *of the plaintiff either,* in the State of California, and we agree also that if the court of Nevada can try the defendant's rights to the water in the State of California, though the Nevada court is not authorized or empowered to settle the rights of the parties in the State of California, it may look [illegible]eless, through the defensive answer to the appro- the [illegible]tion in the State of California, to ascertain and determine whether such appropriation is prior and paramount to the complainant's appropriation, and if not, then to settle and quiet complainant's title and rights thereto.

It will be observed that this statement only contemplates rights to the use of water acquired by appropriation, in which instance the rule generally prevailing is

that those prior in time are prior in right. It leaves out of consideration entirely his riparian rights to the use of water which exist in the State of California, and do not exist in the State of Nevada, and which riparian right does not depend upon the use of the water.

Let us, however, analyze the sentence as it is written, and that the Court has entered a judgment quieting complainant's title to the rights of water. After inquiring into the defendant's rights in the State of California, and assuming that such judgment is pronounced, have you not then determined the defendant's title to the waters in the State of California?

Then it follows that the jurisdiction of the court only affected the water after it reached the State of Nevada. If you have, then you have carried the force of the decree quieting the title into the State of California and affecting the water in that State. To make this clear, let us assume that judgment has been rendered for complainant quieting its title to the water, and that the judgment is offered in evidence of plaintiff's rights to the water in the suits in California. They would not be received in evidence as a muniment of title in the State of California. The entire argument of the Court of Appeals on pages 19 and 20, based upon an assumption of jurisdiction in the court and an assumed contention on the part of appellant that the answer of defendant limits or circumscribes the admitted jurisdiction, whereas the real contention is that the court has not jurisdiction to be limited or circumscribed.

The contention of appellant is that as to the thing in issue of which the court of Nevada has power to determine no conflict of jurisdiction in the State of California can possibly arise. It becomes a question, what is the jurisdiction of the thing in the State of Nevada to ascribe to defendant a lack of power to limit such jurisdiction?

*Let us assume for a moment that the Court of Nevada inquires into the rights of Mr. Rickey in the State of California merely for the purpose of determining what are the rights of Miller & Lux in the State of Nevada, and not for the purpose of determining what are the rights of Miller & Lux in the State of California. Then, what becomes of the doctrine of lis pendens?*

The doctrine of *lis pendens* can only apply to such litigation as has some *thing* for its subject. The doctrine has no application in cases entirely personal. If the thing is Miller & Lux's title in Nevada, then to this thing the doctrine of *lis pendens* must be applied. As this thing was not conveyed by Rickey to the Rickey Land and Cattle Company, there would be no room for the application of the doctrine to a transfer of something other than the thing in litigation. The thing transferred by Rickey was the land and water in the State of California, and unless the thing about which Miller & Lux were litigating to quiet the title was this same property *in the State of California,* then the doctrine of *lis pendens* would be excluded.

The Court of Appeals argues that the thing is in

the State of Nevada as between Miller & Lux and Rickey to sustain the jurisdiction of the court and then impliedly grants an order to apply the doctrine of *lis pendens* on the ground that the thing is that which Rickey transferred to the Rickey Land and Cattle Company; that is to say, for the purposes of jurisdiction the thing, subject of the suit, is in Nevada. For the purposes of the doctrine of *lis pendens,* the thing, subject of the suit, is in the State of California.

If the action is local, and is substantially an action to quiet title in this case, and the thing, the title to which is said to be quited is in the State of Nevada, then it follows that the nature of the action and the location of the thing was the same in *Howell* vs. *Johnson,* 89 Fed., 556; *Hoge* vs. *Eaton,* 135 Fed., 411, and *Anderson* vs. *Bassman,* 140 Fed., 14.

As the action in each of these cases was commenced in the upper State on the stream, it would follow that the court did not have jurisdiction, because the location of the thing was not within the jurisdiction of the court. We believe those cases were correctly decided, and word "decided" upon the contention readvanced in this case. That the easement of the lower owner on the stream extends throughout the length of the stream above his place of diversion.

*The Court of Appeals failed to give recognition to the distinction that the appropriator in the lower State has an interest in the stream in the upper State, while*

*the appropriators in the upper State have no rights whatever to the water in the lower State.*

The last sentence quoted from the opinion seems to assume that the rights to the use of water are all acquired by appropriation in both States, and that the appropriator first in time is first in right. The argument based upon such a conception entirely ignores the rights vested in riparian owners.

In the State of Nevada the courts have refused to apply the doctrine of riparian rights to streams. In the State of California the riparian rights are fully recognized as they existed at common law with but one modification, namely, a reasonable use of the water among the several raparian owners for the purposes of irrigation.

*Lux* vs. *Haggin,* 69 Cal., 255.

In the State of California the riparian owners can use all the water among themselves, and an appropriator upon the stream never acquires any rights as against a riparian owner above his point of diversion upon the stream, and if the Walker River was entirely in the State of California then the title to the water would be owned by the riparian owners along its banks, and these riparian owners could use all of the water among themselves to the exclusion of all appropriators. As the stream is not entirely in the State of California, and as the State of Nevada recognizes no such thing as a riparian right, the question arises, who becomes

entitled to the use of the water after it crosses the State line?

If the riparian right of the State of California excluded the use for irrigation, then all the water of the stream would run into the State of Nevada. The State of California has modified the riparian right so as to permit the riparian owners to use a reasonable quantity for irrigation. To that extent they deprive the State of Nevada of the water so used. If the State of California can deprive the State of Nevada of a part of the water, it may, by its laws, deprive the State of Nevada of all of its water.

It has not yet been decided in the State of California whether an upper riparian appropriator can use all of the water of the stream as against the lower appropriator. If such should be declared to be the law of the State of California, then manifestly the appropriator of water in Nevada would have no greater standing to the water while flowing in the stream in the State of California than would the appropriator in the State of California. The suggestion of this question points out the argument that the appropriator in the State of Nevada, being such has an interest in the stream in the State of California no greater or no less than he would have if his acts of appropriation had actually occurred in the State of California.

The right of a riparian owner in the State of California is a part and parcel of his land (*Lux* vs. *Haggin, supra*), so that in inquiring into the rights of appellant

in the State of California to the water, you are at the same time inquiring into that which is a part and parcel of its land. As against such upper riparian taking *all* the water for use upon riparian land, the lower appropriator may be held to have no cause of complaint. If such should be the holding, then the appropriators in Nevada (in which State riparian rights are not recognized) would have no cause of complaint against Rickey, or the Rickey Land and Cattle Company, riparian owners, who use all the water in the State of California. The Federal Court must adjudge the rights of the parties in the stream according to the laws of the particular State in which the rights are asserted.

*Barney* vs. *Keokuk,* 94 U. S., 324;
*Parker* vs. *Bird,* 137 U. S., 661;
*Hardin* vs. *Jordan,* 140 U. S., 371.

Such court cannot administer a common law exclusively appurtenant, or exclusively riparian, to conform to the law of Nevada or of California. It follows that the statement in the opinion of the Court of Appeals that the inquiry is merely to determine *priority of appropriation,* and to adjudge and command accordingly, ignores absolutely the riparian rights of a part and parcel of the land in the State of California. The conclusion of the court from such a premise must necessarily be wrong. To adjudge the rights of Rickey or his successors in the State of California, the very title to the land of which the water is a part under the riparian law

must be determined, and any command as to the use of such water on such riparian land is a command regarding the land itself. There is what appears to be a radical inconsistency in the argument of the Court of Appeals in determining what is the thing, subject of the action, to sustain the jurisdiction, and the same thing for the application of the doctrine of *lis pendens* against the transferee of Rickey. In the first argument the *title of Miller & Lux* in the State of Nevada is declared to be the thing, and the inquiry into the rights of Rickey in the State of California but an incidental inquiry to ascertain what Miller & Lux's rights were in the stream in the State of Nevada. To be logically consistent this conception should be adhered to. The court should not change its viewpoint so as to sustain the jurisdiction upon the theory that the subject matter of the suit is the title of Miller & Lux in the State of Nevada, and then apply the doctrine of *lis pendens* upon the theory that the subject of the action is the title of Rickey in the State of California. This last has been done. Let us see. It is held that the Rickey Land and Cattle Co., as grantee of Rickey, will be bound by the judgment. How? The answer is by the rule of *lis pendens*. Yet this rule has no application unless there is a thing the subject of the litigation, and the thing has been transferred. If the thing the subject of this litigation is the title of Miller & Lux to water in the State of Nevada, Rickey never attempted to transfer that. He only transferred the rights to water of *Rickey* in the

State of California. It would therefore follow that Rickey did not transfer the thing which was the subject of the action.

This inconsistency points an erroneous conception of the subject of the action in the State of Nevada, when the jurisdiction is sought to be extended into an inquiry of rights to the use of water in the State of California. In other words, the rule of *lis pendens* is applied to a subject matter, water in California, over which the court admittedly has no jurisdiction, while the court asserts its jurisdiction over water in the State of Nevada. The rule of *lis pendens* is applied upon the conception that the subject of the action is Rickey's title to water in the State of California, while the jurisdiction of the court is asserted upon the theory that the subject of the action is the title of Miller & Lux in the State of Nevada.

All of this contradiction disappears when we consider the action as it really is. First an action the subject matter of which is in the State of Nevada, and that the issue, if any is attempted to be presented, between Rickey and Miller & Lux as to water in the State of California, is concerning Miller & Lux's right to water *in the State of California.*

The trouble arises in attempting to apply the rule of *lis pendens* to sustain a jurisdiction of a subject matter that does not exist.

If the Court of Nevada had no jurisdiction to try the title of Miller & Lux to the waters in the State of Cali-

fornia, then the end could not be reached by indirection; that is, the end could not be attained by saying the inquiry into the rights of Rickey in California was to determine what were the rights of Miller & Lux in Nevada, and then applying the rule of *lis pendens* to a conveyance by Rickey of property in the State of California. All this juggling is made necessary by an attempt to affirm jurisdiction where jurisdiction does not exist.

Certainly a plaintiff has no right to an extension of the rule of *lis pendens* beyond all precedent when by bringing the action in the first instance in the proper State no such extension would be required. The rule or doctrine of *lis pendens* is intended to hold jurisdiction acquired; it is not intended to extend it.

There are other parts of the opinion of the Court of Appeals which deal with abstraction so far as the conclusions of that Court are concerned. These are in no sense pivotal, and the conclusions reached are in no manner connected with them.

## II.

*Assuming that the issues presented by the actions commenced by appellant in the Superior Court of Mono County, California, are the same issues presented by the cross-bills filed in the United States Circuit Court for the District of Nevada by appellees, yet as appellees herein were served with summons and made a general appearance in said actions in California*

*by filing demurrers therein before they filed said cross-bills or commenced this action, they thereby waived their right to object to the prosecution of the said actions in California.*

Counsel urged that the fact that one of the grounds of demurrer filed by appellees in the California court was that the California court did not have jurisdiction, and that this saves appellees from any waiver of their right to object to the prosecution of the actions in California.

A demurrer is a general appearance and gives the court jurisdiction over the party on the facts set out in the bill.

*McDonald* vs. *Agnew,* 122 Cal., 448;
*Lowery et al.* vs. *Tile, Mantel & Granite Ass'n of Cal.,* 98 Fed., 817.

If appellees desired to object to the jurisdiction of the California court on the ground that the same issues were pending for determination in another court, such objection should have been made by a special appearance directed to that specific purpose, which might possibly have kept the jurisdiction of the California court from attaching, had it not already attached.

*Security L. & T. Co.* vs. *Boston & S. R. F. Co.,* 126 Cal., 418.
*In re Clarke,* 125 Cal., 388.
*Lowe* vs. *Stringham,* 14 Wis., 222.

*Gilbert-Arnold L. Co.* vs. *O'Hare,* 93 Wis., 194 (67 N. W. Rep., 38).

*Case* vs. *Olney et al.,* 106 Fed. Rep., 433.

The making of a general appearance and filing of a demurrer waives the right to make a special appearance and urge any objection to the jurisdiction of the court on the ground that another action was pending involving the same subject matter.

*Hodges* vs. *Price,* 80 Pac. Rep., 202, 204 (Wash., 1905).

*Larsen* vs. *Allan Line S. S. Co.,* 80 Pac. Rep., 181 (Wash.).

*Walters* vs. *Field,* 70 Pac. Rep. 66 (Wash.).

The objection that another action is pending is urged by a motion to continue the case and await the decision in the other action. The case of the *National Steamship Co.* vs. *Tubman,* 106 U. S., 118, cited by appellees, was one where the defendant had made a special appearance, saving their jurisdictional rights which had been overruled, and thereafter they made their general appearance, which was held not to have waived the point raised by the special appearance which the court had theretofore overruled.

Appellants urge that the subject matter of the original action of *Miller & Lux* vs. *T. B. Rickey et al.,* included the subject matter of the cross-bills and consequently all controversies that might arise between the

co-defendants in said action over their respective rights to the waters of the stream, and thus argue that if the court in the original action had jurisdiction over all questions of facts arising upon the cross-bills of appellees before the cross-bills were filed, the commencement of the action in Mono County infringed the jurisdiction of the said United States Court, irrespective of the cross-bills.

It is to be observed that the bill of complaint herein alleges that the issues presented in said actions in Mono County are the same issues as were presented by the cross-bills (Trans., p. 17). Nothing is said about the issues presented in the California court, being the same issues as were presented by the original bill filed by Miller & Lux. The original bill filed by Miller & Lux was to quiet and protect the title of complainant therein, and had not as its subject or scope a quieting or protecting of the titles of the defendants therein or the adjudication of conflicting rights and claims for title between the defendants. None of these issues were presented by the original bill and none of these issues were in the case until the cross-bills were filed, but prior to that, assuming the courts of California and Nevada have concurrent jurisdiction over this subject matter and issues, these issues had been presented in the California court.

As noted in our opening brief, suppose appellees had not filed any cross-bills, should they be heard for a minute had they come into the United States Court to

obtain an injunction against the appellant herein on the ground that the issues presented by the action in Mono County are the same issues as were presented by the original bill in the case of *Miller & Lux* vs. *T. B. Rickey*? A simple statement of the proposition shows its absurdity.

Therefore we respectfully submit that:

First: The issues presented by the cases brought in the Superior Court of California are not the same issues as those presented by the cross-bills filed in the United States Circuit Court for the District of Nevada.

Second: Assuming that the issues presented by the actions commenced by appellant in the Superior Court of California are the same issues as presented by the cross-bills filed in the United States Circuit Court for the District of Nevada, yet, as appellees herein were served with summons and made a general appearance in said actions in California by filing demurrers therein before they filed said cross-bills, or commenced this action, they thereby waived any right to object to the prosecution of the said actions in California.

Wherefore, the court below erred in making the decree herein.

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